

# AMICC

## THE ICC STATUTE AND US CONSTITUTIONAL QUESTIONS

The debate over US ratification of the Rome Statute of the International Criminal Court focuses pointedly on whether ratification would be constitutional. Critics argue that US ratification of the Rome Statute would be unconstitutional if the ICC were given jurisdiction over US citizens who have committed crimes within the US, particularly if the effects of such crimes were confined to the borders of the US. Such arguments fail to recognize that the ICC stands as a separate entity, not falling under the domain of US Constitution

### Constitutional Issues

Article I, Section 8 of the US Constitution states that Congress has the power to “constitute tribunals inferior to the Supreme Court” and Article III, Section 1 states that the “judicial power of the United States, shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish.” Critics argue that US participation in the Court would violate both Articles I and III as Congress neither created nor drafted the Court’s rules. They cite cases such as *Ex Parte Milligan* (1866) and *Reid v Covert* (1957), where the Supreme Court ruled that the military tribunals created in both cases were unconstitutional since they were not established by Congress, violating Article III. Those who view the ICC as a mere extension of US jurisdiction, allege that similar to these military tribunals, the ICC has not been ordained or established by Congress. Additionally, critics have claimed that the ICC would not qualify as an Article I court, citing *Northern Pipeline Constr. Co. v Marathon Pipe Line Co.* (1982), where only three types of courts would qualify under Article I: territorial courts, with limited authority to US possessions outside the states, military courts, and courts overseeing “public rights” such as licensing by federal agencies. However, the framing of the ICC as a foreign entity disavows such concerns. The ICC is a separate entity from US courts, with its own authority and law, exercising its judicial power in the international community.

### Principle of Extradition

Additionally, the current US extradition process will allow for US ratification of the ICC without any constitutional barriers. Article II, Section 2 of the US Constitution states that the President, with the advice and consent of the Senate, may “make treaties, provided two thirds of the Senators present concur” including the power to surrender, resulting in extradition treaties. **The principle allows for the extradition of US citizens for crimes committed abroad or crimes whose effects have been felt abroad but have been committed within the United States.** The US has established precedent providing the process to allow for the surrender of its own national to a foreign court whose crimes were committed abroad and for crimes committed within the US whose effects were felt abroad.

Though critics argue that the extradition process does not allow the protection of certain rights guaranteed under the US Constitution, generally, courts of the US abide by a **rule of non-inquiry**, not examining the procedural or substantive rights guaranteed in a foreign jurisdiction, as long as the extradition is authorized under law (*Garcia-Guillern v United States* (5th Cir. 1971)). Only when procedures or punishment are so contrary to a federal court’s sense of decency, may the principle be

reexamined (*Gallina v. Fraser* (2d Cir. 1960)). It is highly unlikely that proceedings at the ICC would fall under such an exception, as the ICC Statute contains many protections guaranteed under the U.S. Bill of Rights, including the right to a fair and speedy trial; the right to counsel; a prohibition on ex post facto laws; the presumption of innocence; the right to remain silent; the right to cross-examination; protection against double jeopardy; the right to appellate review, among others.

Critics have additionally argued that the extradition principle differs for the ICC, since foreign entities are distinctively different from foreign states. However, in the International Criminal Tribunal for Rwanda case of *Ntakirutimana v. Reno* [184 F. 3d 419 (1999)], the court authorized the extradition of Ntakirutimana to face charges of genocide and other crimes committed in Rwanda. The decision implied that extradition to foreign entities did not differ from extradition to states. By establishing a process functionally equivalent to extradition, the ICC could operate independently of US jurisdiction.

### **Exclusivity Principle and Effects Doctrine**

Critics also invoke the “**exclusivity principle**,” claiming that the jurisdiction of the US is exclusive and absolute, and hence not subject to limitations not imposed by itself, derives from Chief Justice Marshall’s decision in *Schooner Exchange v M’Faddon* [11 US 116, (1812)]. Scholars have used the decision to claim the unconstitutionality of US ratification of the ICC Statute, particularly when a citizen commits a crime within the US and the effects are felt wholly within the US, with the US having exclusive jurisdiction over such a crime. However, such arguments fail to recognize that Marshall’s reasoning does not rely on the US Constitution. Referring rather to “public law,” he claims that the exclusivity principle is an “attribute of every nation” to which “the whole civilized world concurred.” US case law refers to *Schooner* and the rule of exclusive jurisdiction as the “**law of nations**,” or a matter of customary international law, rather than tied to the US Constitution. Though the exclusivity principle has been codified in US law in Restatement Third §206(a), which states that “under international law, a state has sovereignty over its territory and general authority over its nationals,” the principle has not found its way into the US Constitution, and hence US ratification of the ICC Statute cannot be deemed unconstitutional.

In addition to the exclusivity principle, the “**effects doctrine**” allows citizens to be extradited only if their specific crime or act has effects in a foreign state. If the effects of the specific act are confined to US borders, the US has jurisdiction over its nationals in such cases. The Restatement of Law, Third Foreign Relations Law of the United States §403 states that “whether exercise of jurisdiction over a person or activity is unreasonable is determined by... the link of activity to the territory of the regulating state i.e. the extend to which the activity takes place within the territory or has substantial, direct, foreseeable effect upon or in the territory.” Nevertheless, similar to the exclusivity principle, the effects doctrine originates from the law of the nations rather than American constitutional principles. As the exclusivity principle and effects doctrine are principles of international law not specifically rooted in the US Constitution, the ICC may lawfully assert jurisdiction over US citizens who have committed crimes within the US with the effects of these crimes confined to its borders.

*Researched by Alexander Ward; Written by Alexander Ward and Wasana Punyasena*